

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Brian Lau, Commission Counsel, Legal Division
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Proposed Revolving Door Regulation 18746.3 (Section 87406.3)

Date: November 22, 2006

I. EXECUTIVE SUMMARY

Under the Political Reform Act (“Act”), there are several categories of post-employment laws, commonly known as the “revolving door restrictions.” (Sections 87400-87407.)¹ Section 87406.3 was added to the Act in 2005 (Stats. 2005, ch. 680) and prohibits specified local governmental agency officials from appearing before or communicating with their former local governmental agency employer for a one-year period. This section took effect July 1, 2006.

Proposed regulation 18746.3 is presented to the Commission for adoption. This regulation interprets key provisions of section 87406.3, sets out the required elements of the one-year ban as applied specifically to local officials, and defines certain terms that will assist local officials in determining their obligations.

The October 10, 2006, prenotice version (as well as the currently proposed version) of regulation 18746.3 contains no decision points. At the prenotice presentation of this project, the Commission directed staff to revise subdivision (b)(3) to clarify that payments made for necessary travel, meals, and accommodations received directly in connection with voluntary services are not considered “compensation” under section 87406.3. Additionally, staff proposed a revision to subdivision (a)(4) to provide that general managers or chief administrators of air pollution control districts or air quality control districts are subject to section 87406.3 in addition to section 87406.1.

II. BACKGROUND

Due to the similarities of section 87406.3 to the current revolving door restrictions imposed on state officials and employees, a brief look at the current restrictions is

¹ All references to sections herein are to the Government Code unless otherwise indicated.

warranted for comparison purposes, specifically the permanent ban of sections 87401 and 87402 and the one-year ban of section 87406.

The first restriction imposed on state officials and employees is the “permanent ban.” The permanent ban prohibits a former state official or employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California, or assisting others in the proceeding if the proceeding is one in which the former state official or employee participated while serving the state. (Sections 87401-87402; regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which an official participated. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency” (Section 87400(c).) Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information....” (Section 87400(d).)

The second restriction imposed on state officials and employees is the “one-year ban.” The one-year ban prohibits state officials and employees from communicating, for compensation on behalf of any other person, with their former agency for the purpose of influencing certain administrative or legislative action “or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406; regulation 18746.1.)

The one-year ban applies for 12 months from the date the state employee separates from employment. While in effect, the one-year ban prohibits any formal or informal appearance or oral or written communication with the official’s or employee’s former agency “for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.” (Regulation 18746.2.)

Contrasting the permanent ban on state officials and the one-year ban on state officials, the permanent ban applies to “judicial or quasi-judicial” proceedings while the one-year ban applies to any “appearance or communication [which] is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406.)

III. ISSUES

Like the one-year ban of section 87406, subdivision (a) of section 87406.3, the one-year ban on local officials, provides that an official:

“[S]hall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, that local government agency, or any committee, subcommittee, or present member of that local government agency, or any officer or employee of the local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.”

While the language of section 87406.3(a) closely mirrors the language of section 87406, there is a key distinction found in section 87406.3(d)(1), which provides:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in any regulatory proceeding, whether quasi-legislative or *quasi-judicial*. Administrative action does not include any action which is solely ministerial.” (Emphasis added.)

IV. PROPOSED REGULATION

Regulation 18746.1 sets out the required elements of section 87406, the one-year ban imposed on state officials. As proposed, regulation 18746.3 is drafted to closely mirror current regulation 18746.1, and attempts to alter the elements of regulation 18746.1 only to the degree necessary to address the subtle but key distinctions between the one-year ban as applied to state officials and the one-year ban as applied to local officials.

Generally, the one-year ban on local officials, provided by section 87406.3, prohibits specified local officials, for a period of 12 months after leaving office or employment, from making appearances before or communications with any local agency the official worked for or represented during the 12 months before leaving office or employment, if the former official:

- Was an elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district;
- Performs services for compensation;

- Performs services as an agent, attorney, or representative of any other person; and
- Makes an appearance or communication for the purpose of influencing legislative or administrative action or “any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.”

A. Local Public Officials Subject to the One-Year Ban.

Subdivision (a) of proposed regulation 18746.3 addresses the first key distinction between section 87406.3 and section 87406, which is that section 87406.3 applies only to certain local officials. Since most former local officials will begin their inquiry regarding the one-year ban by determining whether they held a position subject to the ban, subdivision (a) describes the category of officers and employees subject to the ban. These include any: (1) local elected official, (2) chief administrative officer of a county, (3) city manager including the chief administrative officer of a city, or (4) general manager or chief administrator of a special district who holds a position with a local government agency as defined by section 82041.²

As staff proposed at the prenotice presentation, subdivision (a)(4) has been revised to expressly provide that general managers or chief administrators of air pollution control districts or air quality control districts are subject to section 87406.3 in addition to section 87406.1. As you may recall, staff identified an issue as to whether section 87406.3 applies to air pollution control districts and air quality control districts considering the specific one-year ban imposed on these districts in section 87406.1. In comparing sections 87406.3 and 87406.1, staff did not read 87406.3, a more restrictive ban, as contradicting the requirements of section 87406.1, but as imposing requirements applicable to all specified local officials in addition to any requirements imposed by section 87406.1.

B. Six-Step Process.

Subdivision (b) of proposed regulation 18746.3 provides a six-step process that any individual can follow to determine whether the one-year ban for local officials applies. This six-step process is similar to the six-step process of regulation 18746.1.

² At the prenotice presentation of this project, the Commission asked whether managers or chief administrative officers of special districts performing similar functions as a county official (other than the county’s chief administrative officer) would be subject to the ban, while the similar county official is not. The statute does provide this distinction and managers or chief administrative officers of special districts are subject to the ban even where they serve a function similar to county officials who would not be subject to the ban.

Step 1 – Has the local official left his or her local office or employment?

The local official would first determine whether he or she has left his or her local office or employment. Subdivision (b)(1) of regulation 18746.3 provides that an official has left his or her office or employment if the official has either permanently left local government service or is on a leave of absence. This step is identical to step 1 of regulation 18746.1.

Step 2 – Will the appearance or communication be made within 12 months after leaving local office or employment?

Subdivision (b)(2) of regulation 18746.3 merely provides that the ban is in effect for one year. This step is also identical to step 2 of regulation 18746.1.

Step 3 – Is the appearance or communication for compensated services?

An official's activity must be for compensated services to be prohibited. As provided in regulation 18746.1 an exception has been made for payments made for necessary travel, meals, and accommodations received in connection with voluntary services. At the prenotice presentation, staff proposed language taken directly from 18746.1 providing that "a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section." However, the Commission found the proposed language inaccurate in that it classifies these payments as "not prohibited or limited" and recommended revising this language to provide that these payments are not considered "compensation."

Subdivision (b)(3) has been revised accordingly and now provides the following:

"For purposes of Government Code section 87406.3, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not considered compensation."

This revision is not a substantive revision and intends to provide the same exception for these payments (provided by regulation 18746.1 for the state one-year ban) to the local one-year ban.

Step 4 – Will the appearance or communication be made on behalf of any other person?

Subdivision (b)(4) of regulation 18746.3 creates an exception for appearances or communications to represent one's own personal interest but excludes from the exception, appearances or communications to represent one's own personal interest in quasi-judicial proceedings in which the official previously participated. This approach is consistent with the Commission's previous interpretation of the exception for

representing one's own personal interest as applied to the one-year ban and permanent ban for state officials.

Step 5 – Will the appearance or communication be made for the purpose of influencing legislative or administrative action, or any other action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property?

Subdivision (b)(5) of regulation 18746.3 addresses the key distinction between the new ban affecting local officials in section 87406.3 and the one-year ban in section 87406. Specifically, the local ban in section 87406.3(d)(1) provides a distinct definition of “administrative action.” This section provides that “[a]dministrative action” means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in *any regulatory proceeding, whether quasi-legislative or quasi-judicial.*” (Emphasis added.)

By including quasi-judicial proceedings within the definition of “administrative action,” section 87406.3(d)(1) merges the concepts behind both the permanent ban for state officials and the one-year ban for state officials into a single one-year ban for local officials. Unlike state officials, there is no permanent ban for judicial or quasi-judicial proceedings. However, section 87406.3 applies a one-year ban to judicial or quasi-judicial proceedings for local officials.

Subsections (b)(5)(A) and (b)(5)(D) of the draft regulation duplicate the definitions of “administrative action” and “legislative action,” as provided by section 87406.3(d), except for one small clarification within the definition of “administrative action.” The statutory definitions have been included within the regulation to help clarify that the one-year ban for local officials includes quasi-judicial proceedings. Because the Act and regulations only provide definitions for “quasi-legislative” and “quasi-judicial” in the context of state proceedings, broad definitions for “quasi-legislative” and “quasi-judicial” have also been included in subsections (b)(5)(B) and (b)(5)(C).

As discussed above, the proposed regulation includes one clarification to the definition of “administrative action” regarding ratemaking proceedings. Subsection (b)(5)(A) expressly includes ratemaking proceedings within the phrase “regulatory proceedings.”

Step 6 – Which agencies must an official avoid for one year?

Subdivision (b)(6) of regulation 18746.3 provides a test for a public official to determine whether he or she is prohibited from appearing before or communicating with any particular agency. Again, this step is similar to step 6 of regulation 18746.1 except for the deletion of subsection (b)(6)(C), which provides a test for designated employees of the Governor's office that is inapplicable to regulation 18746.3.

Subsection (b)(6)(A) provides that the one-year ban applies to appearances or communications by a local official before or with any local agency the official worked for or represented during the 12 months before leaving local governmental office or employment. (*Perry* Advice Letter, No. A-94-004.) Subsection (b)(6)(B) provides that the one-year ban also applies to appearances or communications by a local official before or with any agency under the direction or control of the official's former agency. This is known as the "pyramid concept." (*Monagan* Advice Letter, No. A-93-473.)

C. Representing Another Public Agency

Last and as provided by section 87406.3(b), subdivision (c) of regulation 18746.3 provides that the one-year ban for local officials does not apply if the official makes an appearance or communication in representation of another public agency.

V. STAFF RECOMMENDATION

Staff recommends that the Commission adopt proposed regulation 18746.3.

Attachment

Proposed regulation 18746.3